ORIGINAL

No. 99-7504

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IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER A. LOPEZ, PETITIONER

v.

RANDY J. DAVIS, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Bureau of Prisons may exercise its discretion under 18 U.S.C. 3621(e)(2)(B) to deny eligibility for early release from custody, based on the successful completion of a substance abuse treatment program, to the category of prisoners whose current offense is a felony that "involved the carrying, possession or use of a firearm." 28 C.F.R. 550.58(a)(1)(vi)(B).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1, at 1-5) is reported at 186 F.3d 1092.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1999. A petition for rehearing was denied on September 16, 1999. Pet. App. 3, at 1. The petition for a writ of certiorari was filed on December 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Section 3621(e)(2)(B) of Title 18 provides that the Bureau of Prisons (BOP) may reduce by up to one year the prison term of a prisoner convicted of a nonviolent offense who successfully completes a substance abuse treatment program. Petitioner was denied eligibility for such early release under a BOP regulation, 28 C.F.R. 550.58(a)(1)(vi)(B), because his current offense is a felony that involved the carrying, possession, or use of a firearm. The United States District Court for the District of South Dakota granted his petition for a writ of habeas corpus and ordered BOP to reconsider petitioner for early release without reliance on that regulation. Pet. App. 2, at 1-8. The court of appeals reversed and upheld BOP's policy as a valid exercise of its discretion. Pet. App. 1, at 1-5.

1. a. In 1994, Congress created an incentive for federal prisoners to participate in BOP's substance abuse treatment program.[1] Congress authorized BOP to reduce a prisoner's sentence up to one year based on successful completion of such a

[1] BOP's entire residential substance abuse treatment program consists of three components: (1) a 500-hour unit-based residential phase within the correctional institution; (2) a transitional phase also within the institution; and (3) a community-based transitional services phase, in a community corrections center or on home confinement. See Program Statement 5330.10, CN-01, ch. 5 at 1 (May 17, 1996).

program. 18 U.S.C. 3621(e)(2). The statute provides, in relevant part:

> **(2) Incentive for prisoners' successful completion of treatment program.--**
>
> * * * * *
>
> **(B) Period of custody.** -- The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a [substance abuse] treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. 3621(e)(2)(B).

b. BOP issued a regulation interpreting Section 3621(e)(2)(B) to exclude from eligibility "inmates whose current offense is determined to be a crime of violence as defined in 18 U.S.C. 924(c)(3)." 26 C.F.R. 550.58 (1995). Included in Section 924(c)(3)'s definition of "crime of violence" is an offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). BOP Program Statement 5162.02 provided that a drug trafficking conviction under 21 U.S.C. 841 or 846 would be considered a "crime of violence" for purposes of early release if the inmate received a two-level enhancement for possession of a dangerous weapon during the commission of the offense, under Sentencing

Guidelines §§ 2D1.1, 2D1.11. Program Statement 5162.02, CN-01, § 9 at 7 (July 24, 1995, as amended April 23, 1996).

The courts of appeals reached differing conclusions on the validity of that BOP regulation and program statement. See Pelissero v. Thompson, 170 F.3d 442, 445-448 (4th Cir. 1999) (BOP has discretion to define "nonviolent offense" to exclude crimes where relevant conduct included possession of a firearm, even if that definition does not harmonize with the judicial interpretation of "crime of violence" under Section 924(c)(3)); Venegas v. Henman, 126 F.3d 760, 761-763 (5th Cir. 1997) (same), cert. denied, 523 U.S. 1108 (1998); contra: Byrd v. Hasty, 142 F.3d 1395, 1396-1398 (11th Cir. 1998) (BOP's interpretation was inconsistent with the term "nonviolent offense" as used in Section 3621(e)(2)(B) because that term included, by implication, only offenses of conviction that were not "crimes of violence" within the meaning of Section 924(c)(3) and Section 3621(e)(2)(B) "addresses the act of convicting, not sentencing or sentence-enhancement factors"); Roussos v. Menifee, 122 F.3d 159, 161-164 (3d Cir. 1997) (BOP exceeded its authority); Bush v. Pitzer, 133 F.3d 455, 456-457 (7th Cir. 1997) (same); Martin v. Gerlinski, 133 F.3d 1076, 1079-1081 (8th Cir. 1998) (same); Downey v. Crabtree, 100 F.3d 662, 670 (9th Cir. 1996) (same); Fristoe v. Thompson, 144 F.3d 627, 631 (10th Cir. 1998) (same).

c. Effective October 15, 1997, BOP revised its regulation governing the Section 3621(e)(2)(B) early release program to clarify its criteria for such release. 62 Fed. Reg. 53,690. The accompanying commentary noted the conflicting judicial holdings on the prior regulation and explained that the new rule "avoids this complication by using the discretion allotted to the Director of [BOP] in granting a sentence reduction to exclude inmates whose current offense is a felony * * * that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosive." Ibid. As an exercise of the discretion vested in the Director of BOP, the amended regulation provides that certain categories of inmates "are not eligible for early release," including inmates whose current offense is a felony that involved the carrying, possession, or use of a firearm or dangerous weapon or explosive. 28 C.F.R. 550.58(a)(1)(vi)(B).

BOP Program Statement 5162.04 identifies offenses that, at the discretion of the BOP Director, preclude an inmate from receiving various BOP program benefits, including early release under Section 3621(e). Section 7 of the program statement provides that

> As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.

> Inmates whose current offense is a felony that:
>
> * * * * *
>
> involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives * * *.

Program Statement 5162.04, § 7 at 9 (Oct. 9, 1997). Subsection 7(b) further specifies that controlled substances offenses, in violation of 21 U.S.C. 841(a) and 846, preclude an inmate from being considered for early release if he received a two-level enhancement under Sentencing Guidelines § 2D1.1 for possession of a firearm. Id., § 7(b) at 11-12.

2. On February 21, 1997, petitioner was convicted in the United States District Court for the Southern District of Iowa of possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 72 months' imprisonment. That sentence was based in part on a two-level enhancement of the offense level under Sentencing Guidelines § 2D1.1(b)(1) because petitioner possessed a firearm in connection with his offense. Presentence Report 4, ¶7; 6, ¶17; Pet. App. 2, at 1.

We have been informed by BOP that, while serving his term of imprisonment, petitioner obtained a place on a waiting list to participate in a BOP substance abuse treatment program. On December 17, 1998, he was notified that he would not qualify under BOP's regulation for early release consideration after completion of the program because his current offense was a

felony that involved the possession or use of a firearm. Petitioner's anticipated release date is June 2, 2002. Pet. 3.

3. Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, in the United States District Court for the District of South Dakota, challenging the denial of his early release eligibility. Pet. App. 2, at 1.

On January 6, 1999, the district court granted the writ. Pet. App. 2, at 1-8. The court held that BOP's categorical denial of early release to "all cases within one general group without individual consideration" was not an exercise of discretion. Id. at 8. The court held, "consistent with" earlier rulings invalidating BOP's original regulation and program statement (see pages 3-4, supra), that BOP exceeded its statutory authority by interpreting Section 3621(e)(2)(B) to allow it to continue "to rely upon factors other than whether the crime of conviction was nonviolent in making the initial determination as to whether a prisoner is eligible to be considered for early release." Id. at 7. The court thereby ordered BOP to reconsider petitioner for early release under Section 3621(e)(2)(B) in accordance with its opinion. Id. at 8.

4. The court of appeals reversed. Pet. App. 1, at 1-5.[2] The court emphasized that Section 3621(e)(2)(6) "vests broad discretion in the BOP to determine which individuals, among the group of statutorily eligible inmates convicted of nonviolent offenses, are appropriate candidates for early release." Id. at 3. The statute, it observed, "stat[es] only that the prison term of an inmate convicted of a nonviolent offense 'may be reduced by the Bureau of Prisons.'" Id. at 3. Thus, the court explained, a prisoner convicted of a nonviolent offense has no entitlement to early release. The court also concluded that Section 3621(e)(2)(6) does not "mandate that the BOP exercise its discretion by making individual, rather than categorical, assessments of eligibility for inmates convicted of nonviolent offenses." Ibid. And it noted that, where an agency fills a statutory gap, its permissible construction of the statute is entitled to deference. Id. at 4 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-845, 866 (1984)). The court concluded that BOP relied on a "manifestly permissible construction of the statute" and appropriately exercised its discretion when it identified, as ineligible for early release, categories of prisoners convicted

[2]The court consolidated cases brought by ten federal prisoners that involved the same early-release issue. Pet. App. 1, at 1-2.

of nonviolent offenses within the meaning of the statute, but whose "underlying conduct indicates that they pose a serious risk to public safety." Ibid.

The court rejected the contention that its ruling was inconsistent with its earlier decision in Martin v. Gerlinski, 133 F.3d at 1079-1081, which invalidated BOP's original regulation and program statement (see pages 3-4, supra). Martin held that, because the statutory language limited eligibility to nonviolent offenders, BOP had to "look to the offense of conviction, not sentencing factors, in determining whether an offender was convicted of a 'nonviolent offense' and thus eligible under the statute for the early-release incentive." Pet. App. 1, at 4. The court explained that Martin is of no relevance to BOP's current policy because, in Martin, the court had not addressed whether "BOP may, as an exercise of discretion, see 28 C.F.R. § 550.58(a)(1), look to sentencing factors in deciding which individuals among statutorily eligible inmates are appropriate candidates for early release," which the court now held it can. Ibid.

DISCUSSION

The court of appeals correctly held that the Bureau of Prisons (BOP) may exercise its discretion under 18 U.S.C. 3621(e)(2)(B), to deny early release to the category of prisoners

whose current offense is a felony that "involved the carrying, possession or use of a firearm," 28 C.F.R. 550.58(a)(1)(vi)(B). Because the circuits are divided on that issue, however, and because the question is important to the proper administration of the early release program by the Bureau of Prisons, the petition for a writ of certiorari should be granted.[3]

1. The Eighth Circuit correctly held that BOP may exercise its discretion under 18 U.S.C. 3621(e)(2)(B), to deny early release to the category of prisoners whose current offense is a felony that "involved the carrying, possession or use of a firearm," 28 C.F.R. 550.58(a)(1)(vi)(B). Section 3621(e)(2)(B) provides BOP with discretion to grant early release to nonviolent offenders who successfully complete a substance abuse treatment program. It states that the term of imprisonment of a prisoner convicted of a nonviolent offense "may be reduced" by BOP upon the prisoner's successful completion of a BOP substance abuse treatment program. 18 U.S.C. 3621(e)(2)(B) (emphasis added).

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[3] A petition for a writ of certiorari in another case raising the same issue and seeking review of the same judgment was docketed by this Court after the instant case was docketed. See Walker v. Davis, No. 99-7558. We are contemporaneously filing a brief in Walker suggesting the Court hold the petition in Walker pending action on the petition in the instant case. Because the two petitions seek review of the same judgment, the petitioner in Walker is a respondent in this case under Supreme Court Rule 12.6 and, if the Court grants review in this case, may file a brief on the merits.

"The word 'may,' when used in a statute, usually implies some degree of discretion." United States v. Rodgers, 461 U.S. 677, 706 (1983). Nothing in the statute contradicts that interpretation.

In light of the statute's grant of discretion to BOP in deciding which nonviolent offenders should receive early release, the question is whether BOP's implementation of the statute is a permissible one. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-845 (1984); see also Reno v. Koray, 515 U.S. 50, 61 (1995). The Eighth Circuit correctly ruled that BOP relied on a "manifestly permissible construction of the statute" and appropriately exercised its discretion when it identified, as prisoners who would not be granted early release under 18 U.S.C. 3621(e)(2)(B), categories of prisoners convicted of nonviolent offenses within the meaning of the statute, but whose "underlying conduct indicates that they pose a serious risk to public safety." Pet. App. 1, at 4. The Ninth Circuit has reached the same conclusion. Bowen v. Hood, 202 F.3d 1211 (9th Cir. 2000) (deferring to BOP's permissible and reasonable exercise of discretion in interpreting Section 3621(e)(2)(B), petition for rehearing en banc pending (filed Feb. 17, 2000).

2. The Tenth and Eleventh Circuits have reached a contrary conclusion. Ward v. Booker, 202 F.3d 1249 (10th Cir. 2000); Kilpatrick v. Houston, 197 F.3d 1134 (1999) (per curiam), aff'g 36 F. Supp. 2d 1328 (N.D. Fla. 1999).[4] Both courts held that BOP's current regulation and program statement are invalid under circuit precedent that had held BOP's original regulation and program statement to be invalid (see pages 3-4, supra). Ward, 202 F.3d at 1254 (relying on Fristoe v. Thompson, 144 F.3d 627 (10th Cir. 1998)); Kilpatrick v. Houston, 36 F. Supp. 2d at 1330 (relying on Byrd v. Hasty, 142 F.3d 1395 (11th Cir. 1998)). The courts concluded that BOP's current regulation and program statement are not based upon a permissible construction of the statute, because Section 3621(e)(2)(B) states that prisoners convicted of nonviolent offenses are eligible for sentence reductions. Those courts reasoned that "any use of sentence enhancements to turn a conviction of a nonviolent offense into a violent offense for purposes of § 3621(e)(2)(B) [is]

[4] The government filed petitions for rehearing en banc in both Ward and Kilpatrick. Although the petition in Ward remains pending before the Tenth Circuit as of the date of this filing, on March 16, 2000, the Eleventh Circuit denied rehearing and rehearing en banc in Kilpatrick. Accordingly, the conflict in the circuits will persist absent this Court's intervention.

impermissible." Ward, 202 F.3d at 1256; see 36 Supp. 2d at 1329.[5]

3. The conflict in the circuits warrants resolution by this Court. BOP administers the early release program on a nationwide basis. During fiscal year 1999, 7473 prisoners were found eligible to participate in BOP's substance abuse treatment program. Of that number, 4166 prisoners were found eligible for early release and 3307 were not. During the same fiscal year, 2537 prisoners were granted early release under the incentive established in Section 3621(e)(2)(B). There has been a large volume of litigation in the lower courts surrounding the BOP's early-release policies, as the cases cited above demonstrate, see page 4, supra. The existence of conflicting criteria presents serious administrative difficulties to BOP. It also produces disparate treatment of similarly situated prisoners. The problem is exacerbated by the fact that a prisoner may seek review of BOP's determination in the district in which he is

[5] Petitioner asserts (Pet. 13-15) that the ruling below conflicts with the Sixth Circuit's decision in Orr v. Hawk, 156 F.3d 651 (6th Cir. 1998). That case involved a similar challenge by a prisoner deemed ineligible by BOP for early release under Section 3621(e)(2)(B), although on a slightly different basis, i.e. because he was convicted of being a felon in possession of a firearm. On the government's petition for rehearing, however, the Sixth Circuit modified its decision, see 172 F.3d 411 (6th Cir. 1999), to delete all references to BOP's current regulation and program statement and relied on BOP's former regulation and program statement. Accordingly, there is no conflict between the instant case and Orr.

presently being incarcerated. Since BOP transfers prisoners to facilities in different circuits as needed to preserve security and population balance, a single prisoner's eligibility for early release may change based on the location of his current place of incarceration. Finally, the incorrect conclusion of the Tenth and Eleventh Circuits that consideration for early-release is mandatory even for categories of prisoners that BOP has determined are not entitled to that benefit undermines the public-safety interests that BOP has sought to further with its interpretive approach. For all of those reasons, this Court should resolve the issue presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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